

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, DC**

TEMECULA MECHANICAL, INC.

and

**Cases 21-CA-39667
21-CA-39834**

**PLUMBERS AND PIPEFITTERS LOCAL 398,
UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING
AND PIPE FITTING INDUSTRY OF THE
UNITED STATES AND CANADA, AFL-CIO**

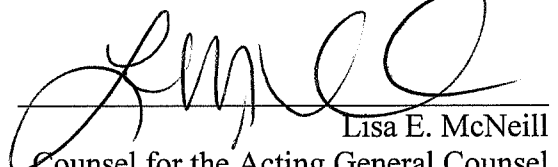
**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
CROSS EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

On May 17, 2012, the Honorable John J. McCarrick, herein called the ALJ, issued his decision in the above-captioned matter. Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, Counsel for the Acting General Counsel hereby files the following exceptions to the ALJ's Decision and Order.

1. To the ALJ's failure to include in the recommended order that Respondent be ordered to cease and desist from failing to recall employee Norman Guardado, which finding accurately reflects the ALJ's decision. (ALJD recommended order)

2. To the ALJ's failure to find that Respondent violated the Act by laying off employee Guardado. (ALJD 10:19)
3. To the ALJ' finding that there is insufficient evidence that Respondent knew Guardado engaged in Union activities in November and December 2011. (ALJD 9:15-16)
4. To the ALJ's finding that Respondent had no knowledge of Guardado's protected activities before his December 2011 lay off. (ALJD 9:23-24)

Respectfully submitted



Lisa E. McNeill
Counsel for the Acting General Counsel
National Labor Relations Board
Region 21

Dated at Los Angeles, California this 28th day of June, 2012.

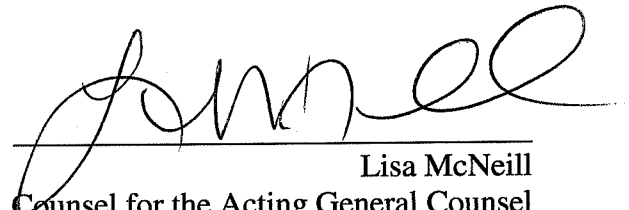
STATEMENT OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's Exceptions to the Administrative Law Judge's Decision was submitted by E-filing to the Washington, D.C. on June 28, 2012.

The following parties were served with a copy of that document by electronic mail on June 28, 2012.

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**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF IN SUPPORT OF CROSS EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. ISSUES PRESENTED

A. Did the ALJ Err in failing to find that Respondent laid off employee Norman Guardado because of his Union and/or protected concerted activities in violation of Section 8(a)(1) and (3) of the Act?

B. The ALJ found that Respondent violated the Act by failing to recall Guardado; however, the recommended order inadvertently omits this finding. Should the order be amended to accurately reflect the ALJ's findings?

II. PROCEDURAL HISTORY

On May 17, 2012, the ALJ issued his decision and order. While the ALJ found that Respondent violated Section 8(a)(1) by interrogating, threatening, and creating the impression that employees' Union activities were under surveillance; and violated Section 8(a)(3) by failing to recall employee Guardado to work, the ALJ did not find that Respondent unlawfully laid off Guardado.

A. Overview and Background

Temecula Mechanical, Inc. ("Respondent") is a family-owned and operated plumbing and site utility company. Patrick Leonard is the owner and president; while MaryLou Leonard, his wife, is the vice president; and Pamela Leonard, his daughter, is the secretary, project manager, and is responsible for the job bidding process. (ALJD 2: 20-24) (Tr. 200, 236, 301)¹

¹ All citations to the hearing transcript will be referred to as "Tr." followed by the appropriate page number(s). The All citations to the ALJ's decision will be referred to as "ALJD" followed by the appropriate page number(s). All citations to Respondent's Exceptions will be referred to as "RE" followed by the appropriate number and citation to Respondent's Exceptions Brief will be referred to as "RB" followed by the appropriate page number(s). General Counsel's exhibits will be referred to as "GCX" followed by the appropriate number(s). Respondent's exhibits will be referred to as "RX" followed by the appropriate number(s).

Many of Respondent's job projects are public works projects, requiring adherence to statutory prevailing wage rate standards. (ALJD 2: 47-48) (Tr. 303)

Norman Guardado ("Guardado") began working for Respondent in 2002 as a pipe tradesman. (ALJD 2: 24) (Tr. 77-78). Sandra Covarrubias ("Covarrubias"), Guardado's wife, began working for Respondent in 2007. Covarrubias worked as an office employee, answering phone, preparing job project bidding documents, and performing general office work. (ALJD 2: 26) (Tr. 29, 46, 265) Covarrubias, Guardado, and Pamela Leonard are personal friends and Pamela Leonard is godmother to Guardado and Covarrubias' son. (ALJD 2: 26-27) (Tr. 41, 201)

B. Work Performed by Respondent

Site work is work that is typically performed outside of the building. (Tr. 137) Pipe tradesmen employees perform the site work, which includes pipe tradesmen includes: trenching the site; installing gas, sewer, water pipes and storm drains from the city main lines to the building structure; and cleaning up the jobsite. (ALJD 2: 32-33) (Tr. 77-78, 247) Pre-slab work is underground plumbing work performed inside the building before the concrete floor is poured. (ALJD 2: 33-34) Topout work is plumbing work performed on top of or after the foundation has been laid inside the building, in the ceiling, and in the walls. Apprentices and journeymen plumbers perform pre-slab and topout work inside the building structure, including running water, gas, sewer pipes in the walls and installing water heaters and all other plumbing related items. (ALJD 2: 35-37)

Over the years that Guardado worked for Respondent, although he never entered or completed an apprenticeship program, he performed more than pipe tradesmen work. (Tr. 103-104) Guardado also worked as a plumber inside of buildings, running pipe for water, gas, and

sewer; installing roof vents; installing roof drains; installing condensation lines; installing water heaters; installing sinks, toilet, and other plumbing fixtures. (ALJD 2: 38-41) (Tr. 78, 112)

While working with Respondent, Guardado had no disciplinary issues and Respondent presented no evidence showing that it experienced of performance problems with Guardado's work skills and abilities. (ALJD 2: 44-45)

C. The Banning High School Jobsite

In about February 2010, Guardado was assigned to work at Respondent's Banning High School jobsite, located in Banning, California ("Banning jobsite"), a prevailing wage jobsite, along with Esteban Delgado ("Delgado"), apprentice employee, and Art Rivera ("Rivera"), foreman. (ALJD 3: 1-4) The entire time while Guardado worked at the Banning jobsite, he performed plumbers' work inside the building but he was paid pipe tradesmen wages.

D. Employees' Union Involvement and Complaints to the Labor Compliance Department

1. Labor Compliance Visits

Companies working on public works job projects are required to maintain daily reports, identifying which employees worked on the jobsite and what work was performed. From these daily reports companies generate monthly payroll reports, certifying their accuracy. These payroll reports are called certified payroll reports. Labor compliance departments will then use these certified payroll reports to determine if companies are in compliance with the prevailing wage rate standards. (Tr. 237, 306-307)

Since the Banning job project was a public works project, Respondent had to adhere to prevailing wage standards. Guardado and Delgado testified that while working at the Banning jobsite, labor compliance officers regularly came to the jobsite to talk to employees. (Tr. 83, 142) The labor compliance agents asked employees about their wages and the work they performed. (Tr. 142) One of the labor compliance officers who visited the jobsite is named Sheri Patton, team labor compliance for the Banning School District. (Tr. 142)

2. Union Meetings

Between October and November 2010, agents of Plumbers and Pipefitters Union made visits to the Banning jobsite and spoke to employees, including Guardado. (ALJD 3: 22-24) . One such agent was Charles Stratton ("Stratton"), organizer for Plumbers and Pipefitters Union, Local 398 ("Union") and representative of District Council 16. (Tr. 13, 81)

In November 2010, employees, including Guardado and Delgado, attended a Union meeting. In the meeting, the employees told Union agents that they were not getting paid correctly; they felt they were not being treated fairly; and they had concerns that Respondent was not properly funding their 401K Plan. (ALJD 3: 11-13) (Tr. 18) Guardado told the Union that he worked inside the building at the Banning jobsite but was getting paid as a pipe tradesman. The Union agents told Guardado that since he was working inside the building he should be earning a plumber's wages. (ALJD 3: 15-16) (Tr. 85-86)

In around November or December 2010, there was a second Union meeting, which Guardado, Delgado, and Rivera attended. (ALJD 3: 16-17) (Tr. 87, 143) Employees again told the Union agents that Respondent was not funding employees' 401K Plan and not paying into employees' healthcare insurance. (ALJD 3: 16-19) (Tr. 19, 146) Guardado testified that the

employees again stated that Respondent was not paying him the correct wage rate for the work he was performing. Guardado, Rivera, and Delgado supplied the Union agents with copies of their paystubs. (Tr. 88-89, 147)

Thereafter, Stratton contacted Piping Industry Progress and Education ("PIPE") and asked that PIPE request a certified payroll report from Respondent for the Banning jobsite project. (Tr. 19-20) PIPE is the trust fund under District Council 16, which maintains a work preservation system to ensure that prevailing wages are paid to employees on public works projects. (ALJD 3: 25-28) (Tr. 16)

3. Respondent Learns of Employees' Protected Conduct

Covarrubias, Guardado's wife, worked directly with Pamela Leonard in Respondent's office. There were only three office workers: Pamela Leonard, Covarrubias, and Trina Wellsandt ("Wellsandt"), office manager. (Tr. 30, 202, 342) Covarrubias did not have an enclosed office space. Rather, Covarrubias' desk was just outside Pamela Leonard's office door. (GCX 4) (Tr. 31, 33)

Pamela Leonard testified that in about November 2010, Respondent began receiving calls from Sherry Patton ("Patton"), team labor compliance agent for the Banning Unified School District, over employees' complaints. Around the same time, representatives from the U.S. Department of Labor ("DOL") began calling Respondent over employees' complaints of unfunded 401K plans. (ALJD 3: 30-32) (Tr. 206-207) Pamela Leonard was aware that the complaints came from employees at the Banning jobsite. (Tr. 208) At the time only Guardado and Delgado worked at the Banning jobsite. Patton requested a copy of Respondent's certified payroll for the Banning jobsite. (ALJD 3: 34-35) (Tr. 344, 346-348)

Pamela Leonard testified that when complaints to labor compliance are not resolved, it can detrimentally impact a company's business as a payment to the company can be withheld. On all job projects, ten percent of the company's contract amount is retained by the general contractor or school district in a retention account. The retention account is maintained until the work is final and complete, which includes any outstanding labor compliance disputes. (Tr. 244-245, 345)

Covarrubias recalled that once the labor compliance department began calling Respondent, Pamela Leonard, repeatedly remarked to Covarrubias that she wanted to find out who had been talking to labor compliance and who initiated the complaint to labor compliance. (ALJD 3: 36-38) (Tr. 35, 49-50) Similarly, Wellsandt testified that Pamela Leonard questioned Covarrubias about whether Guardado knew where the complaint came from. (ALJD 3: 38-40) (Tr. 344) Pamela Leonard admitted that she verbalized an interest in determining who was complaining to labor compliance but characterized her interest as mere "brainstorming" over which employee could be the one complaining. (Tr. 270) However, Wellsandt testified that Pamela Leonard was concerned of the repercussions on the business if the labor compliance complaint became formal, which it later did. (Tr. 345)

Covarrubias testified that when the Union agents began visiting the Banning jobsite, sometime in November or December, Pamela Leonard began asking Covarrubias if Guardado was talking to the Union and if she knew what the Union was doing at the Banning jobsite. (ALJD 3: 45-48) (Tr. 36-37, 39-40, 53-54) Pamela Leonard would ask Covarrubias if she knew what Guardado was telling the Union or what she heard about Guardado and the Union. (Tr. 40, 53-54) Covarrubias also informed Pamela Leonard that Guardado gave the Union his paystubs. (ALJD 3: 3-4) (Tr. 41, 58)

4. *Formal Complaint Filed by the Union*

As a result of the complaints to labor compliance an investigation was initiated over the payment of prevailing wages on the Banning jobsite project. (GCX 2) On February 23, 2011, PIPE filed a formal complaint against Respondent on behalf of Guardado, alleging that Respondent paid Guardado pipes tradesmen wages while working him as a plumber at the Banning jobsite when he should have received the plumbers' prevailing wage rate. (GCX 3) Ultimately, a finding was made that Guardado and three additional employees were paid outside of their job classification. (ALJD 3: 39-40) (Tr. 209)

Due to the formal complaint, Respondent's retention money was withheld. By the time of the unfair labor practice hearing, Respondent still had not received its retention money because of the outstanding labor compliance. (Tr. 349-350)

E. December 17, 2010 – Guardado's Layoff

While working at the Banning jobsite, Guardado and Delgado carpooled together. On December 17, 2010, they arrived to work late. On this morning, Patrick Leonard was present on the site inside the jobsite trailer. (ALJD 4: 16-19) (Tr. 89-90, 148) Patrick Leonard immediately began yelling at them for being late and that the daily work logs were incorrect. Delgado testified that Patrick Leonard said that it was "fucking bullshit" that they were late and their being late was the reasons why his company was failing. (ALJD 4: 19-21) (Tr. 150, 317-318)

Guardado reminded Patrick Leonard that he had to carpool with Delgado and that he was not responsible for completing the daily work logs. (ALJD 4: 20-21) Guardado also told Patrick Leonard that he was not innocent either, since Respondent had Guardado working in the

building as a plumber. (Tr. 120) At some point in the conversation, Guardado told Patrick Leonard that if he did not like it he could fire him right then. (ALJD 4: 23) (Tr. 151, 173-174)

Pamela Leonard conceded that it is not out of ordinary for Patrick Leonard to yell at employees nor is it unusual for him to curse at employee or for employees to curse at each other. In fact, such conduct is quite common in the industry. (Tr. 205)

Later the same day, Patrick Leonard, still at the Banning jobsite, approached Delgado and told him that he should be able to complete the job over the next 2 to 3 weeks. Patrick Leonard then told Delgado that he would be working on the Banning jobsite alone because he was going to let Guardado go. (ALJD 4: 24-25) Delgado replied that he hoped that Patrick Leonard did not expect him to complete the job project in 2 to 3 weeks without Guardado's help because it was not going to happen. Delgado told Patrick Leonard that it was impossible for one person to complete the remaining work in 2 to 3 weeks. (ALJD 4: 25-26) (Tr. 152-153)

Patrick Leonard then spoke to Guardado. At the time Guardado was working inside the building running condensation lines for air-conditioning units. (ALJD 4: 26) (Tr. 93, 110, 321) Patrick Leonard told Guardado that work was slow, there was no work, and as a result, Respondent had to lay him off. (ALJD 4:27) (Tr. 94, 121-122) Guardado objected and stated that there was still work to be done on the Banning jobsite and Respondent had other job projects going on. (ALJD 4: 28) Avoiding eye contact with Guardado, Patrick Leonard denied these claims, asserting that the Banning jobsite was almost done and Respondent had no more work for Guardado. (ALJD 4: 28-29) (Tr. 94, 122, 131)

1. Conversations at the Office About Guardado's Layoff

On December 17, 2010, Patrick Leonard called Pamela Leonard in the office. Because Pamela Leonard answered the call on her speaker phone, Covarrubias overheard a portion of the telephone conversation. (ALJD 4: 32-33) Covarrubias was at her desk, located just outside of Pamela Leonard's office. (Tr. 42) (GCX 2) Covarrubias testified that Patrick Leonard informed Pamela Leonard that he had just let Guardado go because he was late and disrespectful. (ALJD 4: 34) Covarrubias overheard Pamela Leonard say that Patrick Leonard should have let her know first. Pamela Leonard then took the phone call off speaker and closed her door. (ALJD 4: 34-36) (Tr. 43-44, 62)

Pamela Leonard testified that when Patrick Leonard called her to tell her that he had laid off Guardado, she protested and told him that she was going to send Guardado to the Hillcrest High School jobsite, an on-going jobsite that Respondent had in Riverside, California. (ALJD 4: 38-39) (Tr. 275) Pamela Leonard, also claimed that she told Covarrubias to tell Guardado to report to the Hillcrest jobsite. (ALJD 4: 39-40) Covarrubias denied that Pamela Leonard ever instructed her to tell Guardado to report to the Hillcrest jobsite. Instead, well before Guardado was laid off, Pamela Leonard said that she wanted to send Guardado to the Hillcrest jobsite. (ALJD 4: 40-41) Pamela Leonard never called Guardado to tell him to report to Hillcrest. On December 17, Pamela Leonard texted Guardado to call her, but the text message read nothing further. (ALJD 4: 37) (Tr. 201)

2. Pamela Leonard Schedules and Cancels a Meeting With Guardado

After Guardado's layoff, Pamela Leonard arranged a meeting with Guardado, through Covarrubias. Pamela Leonard never personally called Guardado to schedule the meeting.

Guardado testified that on the day he was laid off, he received Pamela Leonard's text message but he did not call her as he thought that they would just talk in the scheduled meeting. (Tr. 95, 123-124) However, as the meeting date approached Pamela Leonard canceled the meeting and did not attempt to reschedule it. (Tr. 45, 67-69, 95, 126)

Pamela Leonard testified that ultimately Covarrubias said that Guardado did want to meet. However, Pamela Leonard testified, she had just learned of Guardado's Union involvement and in the end she never called him. (ALJD 5: 26-34) (Tr. 278)

F. Respondent's Available Job Projects

After Guardado's layoff there was still work to be done at the Banning jobsite. Delgado continued to work at the Banning jobsite until its completion in about mid-February 2011. (Tr. 140) While Delgado worked alone for most of the time, Respondent did, from time to time, assign the following employees to work at the Banning jobsite after laying off Guardado: Chad Leonard,² Terry ____,³ and Steve Eagle. (Tr. 187-188, 191)

At the time of Guardado's layoff, Respondent had other jobsites going on. Respondent had the Hillcrest High School jobsite in Riverside, California, which began in February 2009 and continued until December 2011. At the time, Respondent had about 10-15 employees working at the Hillcrest jobsite. At least three to four pipe tradesmen worked on the Hillcrest jobsite throughout 2011. (Tr. 221, 234) When Guardado was laid off, McKeen, foreman, told Pamela Leonard that he had work for Guardado to perform at the Hillcrest jobsite. (Tr. 220) In mid February 2011, when Delgado was transferred to the Hillcrest jobsite, employees were

² Chad Leonard is Patrick Leonard's son.

³ The record does not reveal Terry's last name.

performing topout work inside the building. (Tr. 140, 160) According to Patrick Leonard, when Delgado was transferred to Hillcrest Respondent still needed help on the jobsite. (Tr. 327)

At the time of Guardado's layoff, Respondent had the Field of Dreams jobsite in Perris, California, which began in November 2010, and continued until November 2011. (Tr. 223-224) Pamela Leonard admitted that pipe tradesmen work was performed on the Field of Dreams jobsite in 2011 and at least four to five pipe tradesmen worked there. (Tr. 233)

In addition, Respondent had the Rio Hondo Community College Physical Education Complex, located in Whittier, California, which began in about March or May 2011, and was still continuing during the February 2012 unfair labor practice hearing. Though this project is a project labor agreement job project, requiring the use of apprentices from State-sanctioned apprentice program, Respondent could still use some of its own core employees in addition to apprentice employees. (Tr. 222, 246)

G. Guardado Was Not Assigned to a Different Jobsite

Although Pamela Leonard claimed that on the day of Guardado's layoff she told Covarrubias to tell Guardado to report to the Hillcrest jobsite, Covarrubias denied that Pamela Leonard made that request. Covarrubias testified that at sometime, *before* the day Guardado was laid off, Pamela Leonard mentioned to Covarrubias that she wanted to transfer Guardado to the Hillcrest jobsite in Riverside, California. (ALJD 4: 41-42) (Tr. 63, 267-277) However, *after* Guardado was laid off Pamela Leonard did not mention transferring Guardado to the Hillcrest jobsite or to any other jobsite. (Tr. 63-64, 74-75) Pamela Leonard did not contact Guardado to tell him to report to Hillcrest or to any other jobsite nor did she send him a letter informing him of the job option. (Tr. 201, 278)

Pamela Leonard claimed that Covarrubias told her that Guardado did not want to work for Jason McKeen ("McKeen"), Hillcrest jobsite foreman. (Tr. 277)

At the hearing, Guardado admitted that McKeen, did not like him (and many other individuals), but Guardado testified that had he been transferred there, he would have still worked under McKeen. (ALJD 5: 6-7) (Tr. 133, 277)

When Guardado went into Respondent's office building to pick up his final paycheck, Pamela Leonard saw Guardado and stood about 12-15 feet from him. Yet she did not speak to Guardado or offer to return him to work. (ALJD 5: 8-10) (Tr. 96-98, 201-202)

H. Respondent Recalled an Employee, Rather Than Guardado

Respondent claims that as a result of the poor economy its business began to suffer in 2010 and in about July 2010, it began reducing its work force. (Tr. 242, 249) Pamela Leonard testified that since Guardado's layoff, Respondent has not hired or recalled from layoff any apprentices. Respondent has, however, recalled pipe tradesmen (Guardado's job classification), like employee Gilberto Ruiz ("Ruiz"), pipe tradesman, who was hired in November 2010, and was laid off a month later in December 2010. (Tr. 250) (GCX 5) By the first quarter of 2011, Respondent recalled Ruiz to work. (Tr. 226-228) (GCX 6) Respondent again laid off Ruiz in about April 2011 and again recalled him. (Tr. 232-233) (GCX 7, 8) Pamela Leonard could not identify any reason why Ruiz was recalled over Guardado. (Tr. 283) At the hearing, Respondent's witnesses claimed that Guardado was difficult to place in a job because he had limited skills and abilities, he had not gone through an apprentice program, and did not perform plumber's work for Respondent. Nevertheless, Pamela Leonard admitted that Ruiz did not have a lot of work knowledge or skill. In fact, she described him as green. (Tr. 282-283) Among the

work Ruiz performed when he was recalled in 2011, was cleaning the job site and pumping trenches – the very work of a pipe tradesmen.

Guardado did not have a driver's license when he was laid off, but Pamela Leonard admitted that it was not an obstacle in transferring him to the Hillcrest jobsite. Pamela Leonard stated that she contemplated ways of working around the issue and which employee to have Guardado ride with. (Tr. 284)

I. January 2011

1. Threat to Layoff

On January 10, 2011, Pamela Leonard testified that she found out that Guardado and Delgado were involved in the Union. (ALJD 5: 35-36) (Tr. 210-211) Pamela Leonard acknowledged that employee Josh Stroud informed her that Guardado and Delgado were Union salts. (Tr. 211) In reaction to this news, Pamela Leonard instructed Wellsandt to compile Delgado's separation paperwork and to cut two payroll checks for Delgado: one payment for the previous week's work and the other payment for the day's work. (ALJD 5: 37) (Tr. 211-212) Pamela Leonard got into her car and drove 40 miles from the office to the Banning jobsite to terminate Delgado. On her way to the Banning jobsite, Pamela Leonard testified that she called Laura DeBore ("DeBore"), representative for Associated Builders and Contractors ("ABC"), and explained to DeBore what was going on and asked what she should do about the situation. DeBore told her not to mention the Union involvement at all to Delgado and instead, act nonchalant and layoff Delgado for lack of work, if there was lack of work. (ALJD 5: 38) (Tr. 214)

Once at the Banning jobsite, Pamela Leonard called Delgado to the jobsite trailer and told him that she was letting him go for lack of work. (Tr. 156-157) Delgado asked her who would finish the Banning job. Pamela Leonard only repeated that Delgado was being laid off for lack of work. Then Pamela Leonard revealed to Delgado the true reason for his layoff: she heard from an employee working at the Hillcrest jobsite that Delgado was involved with the Union. (ALJD 5: 39-40) (Tr. 157, 181, 251) Delgado testified that he was able to save his job by assuring Pamela Leonard that the rumor was untrue and he was not working with the Union. Convinced, Pamela Leonard did not layoff Delgado. (Tr. 158)

2. *Conversation with Guardado*

In around February 2011, Stratton, Union agent, visited Guardado at his home. On that day, Covarrubias, who was still working with Respondent, came home for lunch. When she returned to work after lunch, Covarrubias informed Pamela Leonard that a Union agent was meeting with Guardado. (ALJD 6: 10-12) (Tr. 99-100, 218) Pamela Leonard called Guardado and asked him what he was telling the Union and whether he was telling the Union about the pay. (ALJD 6: 12-13) (Tr. 99, 125) Pamela Leonard conceded that she knew that Guardado was meeting with the Union at his home. (ALJD 6: 12) (Tr. 219) In the conversation, Pamela Leonard still never told Guardado to return to work.

J. February 2011

On about February 25, 2011, Delgado went to Respondent's office to pick up his payroll check. When he arrived, Pamela Leonard asked to speak with him in her office. Patrick Leonard was present. Pamela Leonard apologized about trying to lay him off. Then she told him that

Respondent had found out that it was not Delgado who was involved with the Union, but Respondent discovered that it was Guardado who was working with the Union. (ALJD 6: 18-21) (Tr. 159, 189)

III. ARGUMENT AND CITATION OF AUTHORITY

A. The ALJ Erred by not Finding that Respondent Unlawfully Laidoff

Employee Guardado

1. Analytical Framework for Section 8(a)(3) Violations

In Wright Line, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Circ 1981), cert denied 455 U.S. 989 (1982), the Board established a test for deciding cases turning on employer motivation. To determine whether an employee was discriminated against in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's decision. Under the test, the General Counsel must establish four elements. First, the General Counsel must show the existence of activity protected by the Act. Second, Respondent was aware that the employee had engaged in such activity. Third, the employee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. However, more recently the Board has stated that, "Board cases typically do not include [the fourth element] as an independent element." Wal-Mart Stores, Inc., 352 NLRB 815, fn.5 (2008) (citing Gelita USA, Inc., 352 NLRB 406, 407, fn.2 (2008)).

If the General Counsel is able to make such a showing, the burden of persuasion shifts to Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. Wright Line, supra at 1089. See also Manno Electric, 321 NLRB 278, 280 fn. 12 (1996). Respondent cannot carry this burden merely by showing that it had a legitimate reason for its layoff. Respondent must demonstrate by a preponderance of the evidence that the adverse action would have taken place absent protected conduct by its employees. Roure Bertrand Dupont, Inc., 271 NLRB 443 (1984).

a. Guardado Engaged in Protected Activities

The record fully supports the ALJ's finding that Guardado engaged in both Union and protected concerted activities. (ALJD 8: 31- 9: 4) Guardado, along with other employees, attended Union meetings and sought help with wages and benefits. It is axiomatic that Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours, and working conditions. Further, the Board has consistently held that the communication between employees "for non-organizational protected activities are entitled to the same protection and privileges as organizational activities." Phoenix Transit Systems, 337 NLRB 510 (2002). In about November 2010, and again in December 2010, Guardado and other employees attended Union meetings, wherein they complained about employees not getting paid the correct wage rates. Guardado specifically complained that while Respondent paid him the lower pipe tradesmen wage rate, he was actually working inside the building performing plumbers' work, which work should have yielded plumbers' wages. The employees complained that Respondent treated them unfairly and was not properly funding their 401K plans. The employees then submitted their paystubs to the Union in furtherance of their fight to receive correct wage rates.

b. The ALJ Erred in Finding that Respondent Was Not Aware of Guardado's Protected Activities Until January 10, 2011

In spite of the ALJ's finding that Pamela Leonard first learned on until January 10, 2011 that Guardado was involved with the Union, the ALJ credited Covarrubias testimony that Pamela Leonard interrogated her about Guardado's Union activities before his December layoff. (ALJD 4: 6-13) Thus, the ALJ determined that regularly from November to December 2010, Pamela Leonard was aware that the Union agents were visiting the Banning jobsite and she asked Covarrubias if Guardado had talked to them and asked for any information about Guardado and the Union. (ALJD 3: 45-47) The record also establishes that in November 2010, representatives from labor compliance and from DOL began calling Respondent about employees' complaints of incorrect wage rates and unfunded 401K Plans. (ALJD 3: 30-35) Pamela Leonard was aware of these complaints and she knew that the complaints stemmed from the Banning jobsite where Guardado worked. (ALJD 3: 32-34) Moreover, Pamela Leonard stated that she was determined to find out which employee made the labor complaints and questioned Covarrubias about what information she had inasmuch as Guardado, her husband, worked at the Banning jobsite. Pamela Leonard was concerned of the repercussions that any formal complaints could have on the business. Finally, Covarrubias told Pamela Leonard that Guardado had given the Union copies of his paystubs. All of these factors strongly support a finding that Respondent was well-aware that Guardado was involved in the Union and other protected activities. At a minimum, considering all the foregoing evidence, Respondent perceived that Guardado was involved in protected conduct.

c. Guardado's Layoff Was Motivated by Anti-Union Animus

The requisite adverse employment action was Guardado's layoff. The motivational link between Guardado's protected conduct and his layoff is established through animus and timing. Guardado's layoff came on the heels of employees' attendance at Union meetings and their concerted complaints to labor compliance. The record shows that Pamela Leonard was very interested in finding out which employee was behind the labor compliance complaints. She was concerned of that impact a formal complaint would have on Respondent's business. The evidence demonstrates that Pamela Leonard knew that the complaints came from the Banning jobsite where Guardado work. Pamela Leonard prodded Covarrubias for information on who the complainant could be. Around the same time Pamela Leonard was also interrogating Covarrubias about Guardado's Union activities and Covarrubias informed Leonard that Guardado had submitted his paystubs to the Union. On December 17, 2010, during Patrick Leonard and Guardado's exchange, Guardado reminded Leonard that *he too was not innocent since the company had Guardado – a pipe tradesman – working out of his job classification as a plumber*. Suddenly, Respondent had no more work for Guardado. The timing of Guardado's layoff is persuasive evidence of Respondent's unlawful motive. Pro-Spec Painting, Inc., 339 NLRB 946, 950 (2003). Therefore, contrary to the ALJ's conclusion, there is sufficient evidence in the record to establish that the layoff was unlawfully motivated.

d. Respondent's Defense to the Layoff Should be Rejected

Respondent failed to present sufficient record evidence that Guardado would have been laid off even if he had not engaged in Union or protected concerted activities. Respondent alleges that Guardado was laid off for lack of work. However, the record shows that at the time

Guardado was laid off, Respondent had plenty of available work. The record shows that there was still work to be completed at the Banning jobsite. Despite Patrick Leonard's claim that when Guardado was laid off of the Banning jobsite it had only a couple of weeks worth of work remaining, Delgado told Patrick Leonard that without Guardado there was no way he could complete the project in 2 weeks. Just as Guardado predicted, without Guardado, Delgado completed the project in 2 *months*. During that 2-month period, on a few days, Respondent even assigned at least three other employees to assist Delgado. Respondent did not return Guardado to the jobsite.

Even if Respondent began to experience economic downturn in 2010, resulting in layoffs, Respondent still failed to adequately explain why Guardado was laid off from an incomplete jobsite and why he was never assigned to another jobsite. At the time of Guardado's layoff, Respondent had the Hillcrest jobsite, the Field of Dreams jobsite, and the Rio Hondo jobsite. The record establishes that at all of these jobsites pipe tradesmen work was performed throughout year 2011. Focusing on the Hillcrest jobsite, Patrick Leonard testified that Respondent needed help on this jobsite. Pamela Leonard testified that the Hillcrest foreman told her that he had work for Guardado to perform on the Hillcrest jobsite. Yet Respondent inexplicably laid off Guardado for lack of work. Pamela Leonard never once called or wrote to Guardado to tell him that he was not laid off and was assigned to work at the Hillcrest job. Pamela Leonard even canceled the meeting that she scheduled with Guardado. When Guardado came into the office to pick up his paycheck, just after he was laid off, Pamela Leonard did not tell him that he was not laid off and that he should report to Hillcrest.

Furthermore, the fact that Respondent used 'lack of work' as an excuse for the layoff heightens the doubtful nature of Respondent's defense. Pamela Leonard admitted to fabricating

a 'lack of work' excuse when threatening to layoff Delgado. The true reason was for Delgado's Union activities.

Respondent's contention that Guardado lacked the sufficient experience and know-how to accomplish many job tasks must also fail. This assertion is utterly baseless. In spite of never entering or completing an apprenticeship program, Respondent continued to employ Guardado for *nearly 10 years*. As an employee with Respondent Guardado worked as a pipe tradesman – outside the building; and as a plumber – inside the buildings. Guardado ran water, gas, and sewer pipes and lines, installed roof drains, installed condensation lines, water heaters, sinks and toilets. All tasks that are typically performed by a plumber. Respondent presented *no documents or evidence* showing that there were any problems with Guardado's work performance, his skills, or abilities to perform these job tasks. Yet, Respondent claimed at the hearing that Guardado did not have the requisite skills to do plumbing work and he had limited abilities. Respondent's argument is belied by the fact that on the very day that he was laid off, Guardado was working *inside the building performing plumbers' work*. Finally, what specific work would have been available for Guardado on each jobsite is a matter left for the compliance phase.

Therefore, Respondent's defense to the layoff should be rejected.

B. The ALJ's Order Should be Amended to Accurately Reflect his Findings

The ALJ found that Respondent violated the Act by failing to recall Guardado; however, the recommended order inadvertently omits this finding. Accordingly, the order should be amended to accurately reflect the ALJ's findings.

IV. CONCLUSION

Based on the foregoing, the ALJ erred in not finding that, in addition to failing to recall, Respondent also unlawfully laid off Guardado. The record shows that the recommended order should be modified to include the unlawful layoff and to correctly reflect the ALJ's findings regarding the failure to recall.

V. REMEDY

It is respectfully submitted that the ALJ's recommended order be modified to include the following:

1. Add the following language to the cease and desist portion of the recommended order:

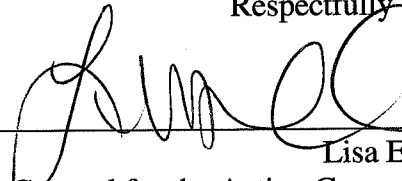
laying off employees for engaging in union and/or protected concerted activities.

failing to recall employees for engaging in union and/or protected concerted activities.

2. Modify the language in the affirmative action portion of the recommended order to read as follows:

(b) Remove from its files any reference to the unlawful layoff and failure to recall Norman Guardado and notify him in writing that this has been done and that the layoff and failure to recall him will not be used against him in any way.

Respectfully submitted



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National Labor Relations Board
Region 21

Dated at Los Angeles, California this 28th day of June, 2012.

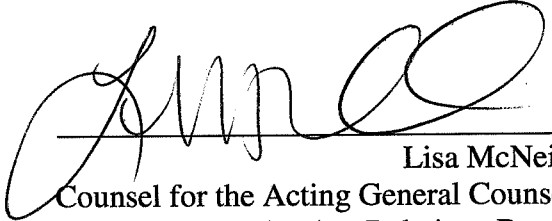
STATEMENT OF SERVICE

I hereby certify that a copy of Counsel for the Acting General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision was submitted by E-filing to the Washington, D.C. on June 28, 2012.

The following parties were served with a copy of that document by electronic mail on June 28, 2012.

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